IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 611 of 1982

For Approval and Signature:

THE HON'BLE MISS JUSTICE R.M.DOSHIT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 of any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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FATEMABAI WD/O JY VORA & 9 - Petitioner(s)

Versus

BHATT DEVIPRASAD MOHANLAL & 11 - Respondent(s)

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Appearance :

MR MRUGEN K PUROHIT for Petitioner No(s).: 1 - 1,2.

MR GIRISH D BHATT for Respondent No(s).: 1 - 2,2 - 2,3.

None for Respondent No(s).: 2.

MR BR PARIKH for Respondent No(s).: 2, 4,5.

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CORAM :THE HON'BLE MISS JUSTICE R.M.DOSHIT

Date : 22/06/2005

ORAL JUDGMENT

Feeling aggrieved by the judgment and order dated 6th January, 1982 passed by the learned Assistant Judge, Nadiad in Regular Civil Appeal No.106/1980, the

petitioners (defendants in Regular Civil Suit No.158/1975) have preferred the present Revision Application under Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as “the Rent Act”).

The respondents-plaintiffs are the heirs and legal representatives of one late Shri Mohanlal Bhatt. The said Shri Mohanlal Bhatt owned three shops bearing City Survey No.2423, 2424 and 2428 in Kapadwanj town. The suit shops were leased to the defendant no.1 for a monthly rent of Rs.81=00. The said Shri Mohanlal instituted Regular Civil Suit No.52/1967 in the Court of Civil Judge (J.D.), Kapadwanj for recovery of the suit shops on the ground, inter alia, that the defendant no.1 had, without the consent of the landlord, unlawfully sublet/assigned part of the suit shops to the defendant no.2 for monetary consideration. The defendant no.2 was running a pan shop in the area sublet to him. The said suit was allowed by the trial Court. However, was dismissed by the lower appellate Court in Appeal No.214/1968. The said judgment of the lower appellate Court was confirmed by this Court

(Coram: B.K.Mehta, J.) in Civil Revision Application No.1280/1970. By judgment dated 30th November, 1975, this Court held that the defendant no.2 did not have independent access to the pan shop otherwise than through the entrance of the suit shop. It was established on evidence that the defendant no.1 did retain control over the entire shop and more particularly the corner/area occupied by the defendant no.2. The dominant consideration was to provide extra amenities to the customers visiting the cold-drink house run by the defendant no.1.

Since the death of the said Shri Mohanlal, his heirs and successors-in-title, the respondents herein, instituted Regular Civil Suit No.158/1975 in the Court of Civil Judge (J.D.), Kapadwanj. The respondents sought decree for eviction on the very ground that the defendant no.1 had sublet or assigned part of the suit premises to the defendant no.2. The plaintiffs were, therefore, entitled to decree for eviction as envisaged by Sections 13(1)(e) and 13(1)(ee). The said suit came to be dismissed by the learned Civil Judge by judgment and order dated 30th April, 1980. Feeling aggrieved, the plaintiffs preferred Civil Appeal No.106/1980 in the

Court of District Judge, Kheda. The learned Assistant Judge, Nadiad was pleased to allow the Appeal and pass decree for eviction. Therefore, the present Revision Application.

Mr.Purohit has submitted that the lower appellate Court has erred in not holding that the present suit was barred by principle of res judicata. He has submitted that the matter at issue in the present suit was in issue directly and substantially in the above referred Regular Civil Suit No.52/1967. The said issue having been decided in favour of the defendants as aforesaid, it was not open to the lower appellate Court to reconsider the said issue and to decide it afresh. In support thereof he has relied upon the judgment of this Court in the matter of **Dhabubai wd/o. Nathubhai Dudhabhai and others v/s. Bai Ratan wd/o. Hirabhai Dahyabhai and others** [1967 GLR 677].

The Revision Application is contested by Mr.Bhatt. He has submitted that a decision would act as res judicata where the matter in issue in the later suit was directly and substantially in issue in the earlier suit. In the present case, he has submitted that in the earlier

suit the decree for eviction was sought under Section 13(1)(e) whereas in the later suit the decree for eviction has been sought under Section 13(1)(ee). He has further submitted that the factum of unlawful assignment is a continuous and recurring cause of action. So long as the defendant no.2 continues in possession of the part of the suit shops and the defendant no.1 receives monetary consideration thereof the plaintiffs shall have recurring cause of action every month. The principle of res judicata, therefore, shall not apply.

I am unable to agree with Mr.Bhatt. The matter at issue is whether the defendant no.1 can be said to have unlawfully sublet or assigned part of the suit premises to the defendant no.2. This question was considered in the earlier proceeding and as recorded herein above, was held to be not a case of sub-tenancy. It is true that the Court had no occasion to consider whether it can be said to be unlawful assignment as envisaged by Section 13(1)(ee) of the Rent Act. It appears that the said ground for eviction was available to the plaintiff on the date of the suit. However, he did not take a plea of unlawful assignment. If a ground for a relief is available and is

not taken in the earlier suit, the same shall act as constructive res judicata in the later suit. It is not disputed that the nature of possession of the defendant no.2 of the part of the suit shops has not been changed over the years. The nature of possession is the same as was in the year 1962. The aforesaid decision would hit the plaintiffs squarely on face. No decree for eviction, therefore, can be passed under Section 13(1)(e) or Section 13(1)(ee) of the Rent Act.

No other contention is raised before me. In view of the above discussion, the Revision Application is allowed. The judgment and order dated 6th January, 1992 passed by the learned Assistant Judge, Nadiad in Regular Civil Appeal No.106/1980 is quashed and set-aside. The judgment and order dated 30th April, 1980 passed by the learned Civil Judge (J.D.), Kapadwanj in Regular Civil Suit No.158/1975 is restored. Rule is made absolute with cost.

(Ms. R.M.Doshit, J.)

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